PUBLIC PROSECUTOR

v.

CHEAH CHENG ENG

SUPREME COURT, PENANG
ABDUL HAMID OMAR CJ (MALAYA)
MOHD. AZMI SCJ
SYED AGIL BARAKBAH SCJ
[CRIMINAL APPEAL NO. 4 OF 1985]
10 JANUARY 1986

CRIMINAL LAW AND PROCEDURE: *Jurisdiction - Transfer of cases from High Court to Subordinate Court - Section 417(1)(e), (aa) of Criminal Procedure Code - Section 417(2) - Section 418(i) - Requirement of affidavit - Limitations of transfer by High Court - Section 417(aa) to (ee) - Commencement of trial - Criteria of distinguishing cases - Dangerous Drugs (Amendment) Act 1983 - Cases pending trial before amending Act - Power of Public Prosecutor under s. 41A of the Act - Article 145(3) of Federal Constitution.*

The respondent was charged under s. 39B of the Dangerous Drugs Act 1952 (hereinafter referred to as the said Act) for trafficking in 506.4 grammes of cannabis on 22 December 1982 in Alor Setar. The Public Prosecutor asked that the case be transferred from the Magistrate's Court to the Sessions Court for trial. The case was fixed for hearing on 29, 30, 31 December 1984. In the meantime, s. 39B(2) of the said Act was amended, the new amendment being effective from 14 April 1983. By reason of the amendment a question arose whether the Sessions Court had jurisdiction to hear cases falling under s. 39B committed prior to the coming into force of the amendment. A ruling was given on 3 April 1984 by the High Court at Kuantan to the effect that s. 39B cases pending before the amendment could not be tried at the Sessions Court. Consequently, the case was transferred to the Alor Setar High Court. Mustapha J in the High Court, acting under s. 417(1)(e) and (aa) of the Criminal Procedure Code ordered the case to be sent down for hearing in the Sessions Court. Prior to this, a decision was also made in *P.P. v. Hun Peng Khai* [1984] 2 CLJ (Rep) 391 which in short, held that once accused persons were charged and their cases fixed for hearing in the Sessions Court before the coming into force of the amending Act, that gave them a vested right to trial in that Court. This decision was upheld by the Federal Court.

The Public Prosecutor is now appealing against the decision of Mustapha J above.

Held:

[1] Section 417(1)(e) and (aa) of the Criminal Procedure Code ("the Code") provides for certain circumstances under which the High Court can transfer cases to a Subordinate Court. Section 417(2) of the Code allows the High Court to make an order under s. 417(1) of the Code either on the report of the lower Court or on its own initiative. Section 418(i) of the Code requires every application for the exercise of the power conferred by s. 417 of the Code to be made by motion which shall, except when the applicant is the Public Prosecutor, be supported by affidavit.

[2] In this case, the High Court did not make an order on its own initiative but pursuant to an oral application by defence Counsel in which event there ought to have been a motion supported by an affidavit. There was no affidavit in this case.

[3] It is also to be noted that since the learned Judge made an order pursuant to the power conferred by s. 417 of the Code, such order should be within the confines of the second limb of s. 417, namely para. (aa) to (ee).

[4] Under para. (aa) to (ee), the High Court in exercise of the power conferred under s. 417(a) to (e) may only transfer a case from a Subordinate Criminal Court to another criminal Subordinate Court or from a Subordinate Criminal Court to itself (see Suffian LP in Federal Court decision of *PP v. Lim Shui Wang & Ors.* [1979] 1 MLJ 65).

[5] Viewed in the light of this authority, the learned Judge had erred in law in that he had no power to transfer the case from the High Court itself down to the Sessions Court for trial.

[6] Cases pending trial prior to the coming into force of the amending Act may still be heard by the Sessions Court unless of course the Public Prosecutor should choose to invoke s. 41A of the Act which empowers the Public Prosecutor to require any case in respect of an offence under the Act to be tried by the High Court.

[7] It is of fundamental importance that a distinction be drawn between the present case and *Hun Peng Khai's* case. In the latter, the case was transmitted to the High Court for trial by the Sessions Court President who felt bound by the judgment of Shaik Daud J in Kuantan Criminal Trial Nos. 1 and 4 of 1984. This was done after the trial had commenced in that Court, that is, each had claimed trial and one witness had given evidence. In that sense the accused had a vested right to have his case heard in the Sessions Court. In the instant case, however, the trial had not yet commenced and as such it cannot be said that the accused had a vested right to trial in the Sessions Court. The Court was of the view that so long as the case was still before a Subordinate Court and the trial had not yet commenced, the Public Prosecutor by virtue of the power vested in him under s. 41A of the Act and also under Article 145(3) of the Federal Constitution may choose the forum for trial.

[8] Fundamentally, s. 41A of the Act creates the further distinction between the present case and *Hun Peng Khai's* case because the instant case was transferred from the Sessions Court to the High Court for trial pursuant to a requisition by the Public Prosecutor under s. 41A of the Act whereas it was not so in *Hun Peng Khai's* case.

[Appeal allowed. Order of the Judge set aside. Case remitted to High Court for trial.]

Cases referred to:
PP v. Hun Peng Khai [1984] 2 CLJ (Rep) 391
PP v. Lim Shui Wang & Ors. [1979] 1 MLJ 65

Legislation referred to:
Criminal Procedure Code ss. 417, (1), (1)(e), (aa), (2) 418(i)
Dangerous Drugs Act 1952 ss. 39B, 39B(1), 39B(2), 41A
Dangerous Drugs (Amendment) Act 1983, ss. 15, 16
Federal Constitution, art.145(3)

For the appellant - Mohtar Abdullah (DPP)
For the respondent - Karpal Singh (V. Sithambaram with him); M/s. Kumar & Co.

JUDGMENT

Abdul Hamid Omar CJ (Malaya):

The appeal is by the Public Prosecutor against the decision of Mustapha J ordering the accused Cheah Cheng Eng (the respondent in this appeal), who is charged under s. 39B of the Dangerous Drugs Act 1952 (hereafter called "the said Act") in *PP v. Cheah Cheng Eng* Kedah Criminal Trial No. 37 of 1984 be sent down to the Alor Setar Sessions Court for trial.

The charge is for trafficking in 506.4 grammes of cannabis on 22 December 1982 at about 9.30 p.m. at the back of Restaurant Sentosa, Jalan Limbong Kapal, Alor Setar. The accused was arrested on 22 December 1982 and produced before the Magistrate's Court on 4 January 1983. The Prosecuting Officer asked for a postponement pending instructions from the Public Prosecutor. The case was called for mention once a month until 22 November 1983 when the Prosecuting Officer tendered the consent of the Public Prosecutor and asked that the case be transferred to the Sessions Court for trial.

The respondent was produced before the Sessions Court on 30 November 1983. The amended charge was read and explained to him. He claimed trial. The case was fixed for hearing on 29, 30 and 31 December, 1984.

In the meantime s. 39B(2) of the said Act was amended (Act A553) by the deletion of the words "or imprisonment for life and shall, if he is not sentenced to death, also be liable to whipping" effective from 14 April 1983. By reason of the amendment a question arose whether the Sessions Court had jurisdiction to hear cases falling under s. 39B committed prior to the coming into force of the amendment. A ruling was given on 3 April 1984 by the High Court at Kuantan to the effect that s. 39B cases pending the amendment could not be tried at the Sessions Court.

Consequently, this case was transferred to Alor Setar High Court. For the purpose of the transmission to the High Court the Public Prosecutor issued a new consent on 29 May 1984. The Public Prosecutor also issued a requisition under s. 41A of the Act for the case to be tried in the High Court. The accused was produced before the High Court on 17 June 1984.

Meanwhile a decision was made in *PP v. Hun Peng Khai* [1984] 2 CLJ (Rep) 391 (Penang High Court Criminal Revision No. 3/85) to the effect as follows

> once the accused persons in this case were charged and their cases fixed for hearing in the Sessions Court before the coming into force of the amending Act that gave them a vested right to trial in that Court.

The decision was upheld by the Federal Court. Our view on the effect of this decision will be discussed shortly.

We now turn to the present case. The learned Judge purportedly acted under s. 417(1)(e) and (aa) of the Criminal Procedure Code when he ordered the case to be sent down for hearing in the Sessions Court. Section 417(1)(e) and (aa), for convenience, are reproduced hereunder and they read-

> 417. (1) Whenever it is made to appear to the High Court-
>
> ...
>
> (e) that such an order is expedient for the ends of justice, or is required by any provision of this code, it may order-
>
> (aa) that any offence be inquired into or tried by any Court not empowered under ss. 121 to 126 but in other respects competent to inquire into or try such offence.

It is to be noted that s. 418(i) Criminal Procedure Code requires every application for the exercise of the power conferred by s. 417 Criminal Procedure Code to be made by motion which shall, except when the applicant is the Public Prosecutor, be supported by affidavit. But in the case of the application made before the learned Judge, it was not proceeded by way of motion and it was also not supported by any affidavit.

Notwithstanding s. 418(i), it appears that subsection (2) of s. 417 Criminal Procedure Code allows the High Court to make an order under sub-section (1) of s. 417 Criminal Procedure Code "either on the report of the lower Court, ... **or on its own initiative**." (Emphasis is Mine). But such is not the case here. The Court did not make an order on its own initiative but pursuant to an oral application by the defence Counsel in which event there ought to have been a motion supported by an affidavit as required by s. 418(i) Criminal Procedure Code.

In this connection it is also to be noted that since the learned Judge made an order pursuant to the power conferred by s. 417 of the Criminal Procedure Code, such order should be within the confines of the second limb of s. 417 (1), namely paras. (aa) to (ee).

Under paras. (aa) to (ee), the High Court in exercise of the power conferred under ss. 417 (1)(a) to (e) may only transfer a case from a Subordinate Criminal Court to another Subordinate Criminal Court or from a Subordinate Criminal Court to itself. In *Public Prosecutor v. Lim Shui Wang & Ors.* [1979] 1 MLJ 65 (Federal Court), Suffian, LP delivering the judgment of the Court on this particular point had this to say at p. 66, column 2,

> From subsection (2) of s. 417 it is clear that the High Court may transfer a case on the report of the lower Court or on the application of the Attorney-General or, as happened here, on its own initiative; but this is subject to two restrictions. First, the High Court may do so only for the reasons stated in para. (a) to (e) of sub-section (1) of s. 417, and secondly, the High Court may transfer a case only from a subordinate Court to another subordinate Court or to itself, but not from itself to a subordinate Court.

Viewed in the light of this authority, it is our view that the learned Judge had erred in law that he had no power to transfer the case from itself down to the Sessions Court for trial.

At this juncture, we return to the judgment of Edgar Joseph Jr., J in *Public Prosecutor v. Hun Peng Khai & Ors.*

The circumstances surrounding that case were that Hun Peng Khai and others were charged before the Sessions Court for offences under s. 39B(1) of the Dangerous Drugs Act 1952. The Dangerous Drugs (Amendment) Act 1983 amended the Dangerous Drugs Act 1952, so that offences under s. 39B(1) were made punishable by death and became triable only in the High Court. Prior to the amendment the cases were publishable with imprisonment for life or death and could be tried in appropriate cases in the Sessions Court. As a result this particular case was transmitted to the High Court for trial. Basically the question that arose was "Whether ss. 15 and 16 of the Dangerous Drugs (Amendment) Act 1983 which confer exclusive jurisdiction on the High Court to try offences in contravention of s. 39B(1) of the Dangerous Drugs Act 1952 have the effect of taking away jurisdiction of the Sessions Court even with regard to cases pending trial before the latter prior to the coming into force of the amending Act?"

The answer to this question is in our view in the negative. Cases pending trial prior to the coming into force of the amending Act may still be heard by the Sessions Court unless of course the Public Prosecutor should choose to invoke s. 41A of the Act which empowers the Public Prosecutor to require any case in respect of an offence under the Act to be tried

by the High Court. It is of fundamental importance therefore that a distinction be drawn between the present case and *Hun Peng Khai's* case. In *Public Prosecutor v. Hun Peng Khai & Ors*., supra, the case was transmitted to the High Court for trial by the Sessions Court President who felt bound by the judgment of Shaik Daud, J in Kuantan Criminal Trials Nos. 1 and 4 of 1984. This was done after the trial had commenced in that Court, i.e. after they had each claimed trial and one witness Sergeant Major Mokhtar had already given evidence. In that sense the accused had a vested right to have his case heard in the Sessions Court. In the instant case, however, the trial had not yet commenced and as such it cannot be said that the accused had a vested right to trial in the Sessions Court. We are of the view that so long as the case was still before a Subordinate Court and the trial had not yet commenced the Public Prosecutor by virtue of the power vested in him under s. 41A of the Act and also under Article 145(3) of the Federal Constitution may choose the forum for trial.

Fundamentally s. 41A of the Act creates the further distinction between the present case and *Hun Peng Khai's* case. The case under consideration was transferred from the Sessions Court to the High Court for trial pursuant to a requisition by the Public Prosecutor under s. 41A of the Act whereas it was not so in *Hun Peng Khai's* case. For convenience, s. 41A(1) is reproduced hereunder and it reads-

> 41A. (1) Where any case in respect of an offence under this Act is triable exclusively by the High Court or is **required by the Public Prosecutor to be tried by the High Court**, the accused person shall be produced before the appropriate Subordinate Court which shall, after the charge has been explained to him, transmit the case to the High Court without holding a preliminary inquiry under Chapter XVII of the Criminal Procedure Code, and cause the accused person to appear or be brought before such Court as soon as may be practicable.

For reasons we have stated, we allow this appeal. The order of the Judge is set aside and the case is remitted to the High Court for trial.

Also found at [1986] 1 CLJ 303